RE: NYANA PANDITHAN; *EX PARTE*: MUNIAMAH D/O NARAYANAN & 6 ORS.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[BANKRUPTCY NO. 29-162-92]
15 DECEMBER 1993

BANKRUPTCY: Judgment debtor filing motion to set aside Bankruptcy Notice and Creditors Petition - Whether service of Bankruptcy Notice proper - Whether Court ought to dismiss the petition on the grounds that the judgment debtor is able to pay his debts - Whether s. 6(3) of the Bankruptcy Act 1967 applicable - Whether amount stated to be due was wrong - Whether Counsel for the judgment creditors had authority to take bankruptcy proceedings against the debtor.

The judgment creditors filed a Creitors Petition for a receiving order to be made against the judgment debtor for failing to comply with the requirements of a Bankruptcy Notice served on him.

The judgment debtor filed a notice of motion to set aside the Bankruptcy Notice and the Creditors Petition on the grounds, *inter alia*, that the amount stated to be due is wrong and/or miscalculated and that the judgment creditors are "extorting" money from the debtor and that the Counsel for the judgment creditors had no authority to take bankruptcy proceedings against the debtor.

Held:

[1] There was nothing in the affidavit filed by the debtor to show that the service of the Bankruptcy Notice is bad in law and in fact the affidavit of service filed in Court shows that the Notice was personally served on the debtor.

[2] The ability to settle any judgment debt in full under s. 6(3) of the Bankruptcy Act must be established before the act of bankruptcy is committed and it is now too late for the debtor to say that he is a person of means and that he is able to pay his debt. Although the judgment debtor had attempted to tender payments, where tender is made after an act of bankruptcy has been committed, the creditor is fully justified in refusing the money.

[3] It was not disputed that three payments were made by the debtor to the previous solicitors of the creditors which payments should have been but were not taken as a reduction of both the total principal amount and also the interest of each of the creditor's debt up to the date when each of the three payments were made.

[4] As shown in the Bankruptcy Notice, interest was calculated on the total amount due from the date of the judgment order up to the date of issue of the Bankruptcy Notice and that is clearly wrong. Proviso 2(ii) to s. 3 of the Bankruptcy Act cannot be successfully invoked by the judgment creditors as this was not a case where the debtor is merely claiming that the sum specified in the Notice as the amount due exceeds the amount actually due. In the circumstances the Bankruptcy Notice is bad and should be ste aside on this ground.

[5] There was no specific rebuttal evidence to the allegations made by the second and fourth judgment creditors that they did not give authority to anybody to commence or proceed with the bankruptcy proceedings. The fourth judgment creditor is illiterate and there was no explanation offered to show that he knew that he was affixing his thumbprint to the verifying affidavit giving his consent and therefore authority to proceed against the judgment debtor in bankruptcy.

[Motion allowed. Bankruptcy Notice and Creditors Petition set aside with costs].

Cases referred to:
Re Yong Chooi Fong [1992] 2 CLJ 106 ***(refd)***
Mat Shah bin Safuan [1991] 2 MLJ 48 ***(foll)***
Re Lowe 7 Mor 25 ***(refd)***
Re Gentry [1910] 1 KB 825 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3 proviso 2(ii), 6(3)
Bankruptcy Rules 1969, rr. 18, 94(1)(b), 95

Other sources referred to:
The Laws and Practice in Bankruptcy, Williams and Muir Hunter, 19th Edn., pp. 38, 63

For the judgment creditors - V. Muthusamy; M/s. V. Muthusamy & Tan
For the judgment debtor - M.A. Vadiveloo; M/s. Veloo & Co.

JUDGMENT

K.C. Vohrah J:

Seven judgment creditors filed a Creditors' Petition under the Bankruptcy Act 1967 (the Act) for a receiving order to be made in the estate of the judgment debtor on the ground that the judgment debtor is justly and truly indebted to

the creditors in the sum of RM17,446 and that the debtor had committed an act of brankruptcy on 25 April 1992 in failing to comply with the requirements of a Bankruptcy Notice dated 4 March 1992 and served on him on 17 April 1992.

The notice of motion filed by the judgment debtor is to set aside the Bankruptcy Notice and the Creditors' Petition. The notice of motion cannot be a substitute for an affidavit in opposition which has to be filed under r. 95 of the Bankruptcy Rules 1969 (the Rules) to set aside a bankruptcy notice in respect of the matters referred to in r. 94(1)(b) (see *Re Yong Chooi Fong* [1992] 2 CLJ 106).

The debtor may, however, apply by motion under r. 18 "to set aside the bankruptcy notice on other grounds e.g. irregularity, bad service, payment (or *quaver* legal tender) of the debt.... But the Court cannot on such an application go behind the judgment and inquire into the validity of the debt, as in the case of a petition ..." (see **The Laws and Practice in Bankruptcy** by Williams and Muir Hunter 19th Edn., p. 38 quoted in *Re Yong Chooi Fong*). The grounds that the judgment debtor is relying on do not appear to be matters which could have been prosecuted under Rule 95.

The grounds relied by the debtor in his motion are 4:

1. That the service of the Bankruptcy Notice dated 4 March 1992 is not proper.

   In rambling affidavits filed by the judgment debtor there is nothing to show that the service of the notice is bad in law and there is in fact an affidavit of service dated 18 April 1992 filed in Court on 28 April 1992 by one Sadasivam s/o Manikam to show that he personally served the notice on the debtor on 17 April 1992 at premises No. 136-1, Jalan Tun Sambanthan, Kuala Lumpur. This ground must necessarily fail.

2. That the judgment debtor is able to pay his debts and under s. 6(3) of the Act the Court ought to dismiss the Petition.

   What has been alleged in the affidavits filed by the judgment debtor is that he is a person of means and that he is able to pay the debt and that he has paid a substantial portion of the debt and that the 2nd and 4th judgment creditors have had their debts satisfied. The 2nd and 4th creditors do not admit that they have been fully paid; in fact they are seeking for an order that the judgment debtor pay a fixed monthly sum to settle their balance of the judgment sum. In *Mat Shah bin Safuan* [1991] 2 MLJ 48 at p. 50 it has been held that the ability to settle any judgment debt in full under s. 6(3) of the Act "must be established before the act of bankruptcy is committed, i.e. before the expiry of the seven days after service of the bankruptcy notice on the debtor".

   It is too late to say the debtor is able to pay his debt.

   The judgment debtor also stated that he tendered payment of RM3,000 and attempted to tender another RM2,000 through bank drafts and that he was unsuccessful and he exhibited copies of the bank drafts. However, as pointed out in Williams on Bankruptcy at p. 63 where tender is made after an act of bankruptcy has been committed, the creditor is fully justified in refusing the money.

   Re Lowe, 7 Mor 25; *Re Gentry* [1910] 1 KB 825.

3. That the amount due is wrong and/or miscalculated and that the Judgment creditors are "extorting" money from the debtor.

   The Bankruptcy Notice shows how much was the judgment debt of each of the 7 creditors as at the date of judgment on 18 July 1989. The order of the Sessions Court shows interest was awarded on the sums of the 7 creditors and 2 others at 8% per annum as from 29 December 1986. The Bankruptcy Notice reflects that interest on each sum that was owed, interest at 8% per annum was charged from 29 December 1986 to 4 March 1992 (date of notice) amounting to RM9,263.30. It is not disputed, however, that 3 payments were made to the previous solicitors of the creditors, on 3 August 1990, 8 September 1991 and 21 October 1991 respectively amounting to RM5,000. Whenever each payment was made that payment should have been taken as a reduction of both the total principal amount and also the interest of each of the creditor's debt up to the date when each of the 3 payments were made.

However, this was not done and instead, as shown in the bankruptcy notice, interest was calculated on the total amount due from the date of the judgment order (RM22,350) up to the date of issue of the bankruptcy notice and that is clearly wrong. This is not a case where the debtor is merely claiming that the sum specified in the notice as the amount due exceeds the amount actually due. Proviso 2(ii) to s. 3 cannot be successfully invoked by the judgment creditors.

In my view the bankruptcy notice is bad and should be set aside on this ground.

4. That the Counsel for the judgment creditors had no authority to take bankruptcy proceedings against the debtors. In a copy of his affidavit affirmed on 7 October 1992 the 4th judgment creditor, Arumugam s/o Ponnan, alleges in paragraphs 4 and 5 of his affidavit:

> 4. While there was some delay in one getting the money I instructed M/s. Muthusamy & Co. to expedite the recovery of the balance from the judgment debtor. I still want my money to be paid by instalment because I know the judgment debtor is in a position to pay. I do not intend to put the judgment debtor into bankruptcy as that will delay the recovery of the money.
> 5. I intend to ask the Court to order the judgment debtor to pay a fixed sum monthly to settle any balance of the judgment sum. **With this intention I collateraly signed on an affidavit earlier and not for the purpose of putting the judgment debtor in Bankruptcy**.
> (emphasis added)

The affidavit to which he referred in paragraph 5 as one he affirmed with the other creditors must refer to the affidavit verifying the petition where he affixed his thumbprint.

The 2nd judgment creditor Subramaniam s/o Sinnapan in an affidavit affirmed on 22 November 1992 (see Exhibit MSSG-1 in supplementary affidavit of the judgment debtor (Enclosure 15) makes the same allegations as made by the 4th judgment creditor.

These are serious allegations showing that they did not give authority to anybody to commence or proceed with the bankruptcy proceedings. There was no specific rebuttal evidence in respect of the specific allegations contained in the paragraphs of the affidavit of the 4th judgment creditor set out above and the similar paragraphs in the affidavit of the 2nd judgment creditor. It has to be noted that it is not disputed that the 4th judgment creditor was illiterate. His thumbprint affixed on the verifying affidavit and in the affidavit filed in support of the judgment debtor would corroborate that and there is no explanation offered to show that he knew that he was affixing his thumbprint to the verifying affidavit giving his consent and therefore authority to proceed against the judgment debtor in bankruptcy. The judgment debtor succeeds on his fourth ground also.

In the result I allow the motion and set aside the Bankruptcy Notice and the Creditors' Petition with costs.